

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 19**

CORNISH COLLEGE OF THE ARTS,¹

Employer

and

Case 19-RC-276616

**OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 8**

Petitioner

DECISION AND DIRECTION OF ELECTION

Cornish College of the Arts (Employer) is a private college of the arts located in Seattle, Washington. On May 4, 2021, a petition was filed by Office & Professional Employees International Union, Local 8 (Petitioner) seeking to represent certain employees of the Employer. Specifically, the Petitioner has asked for a unit to include all unrepresented employees who are residual to the existing units represented by other labor organizations, excluding all managerial, temporary, confidential employees and statutory supervisors as described in the Act.

A hearing was held before a Hearing Officer of the National Labor Relations Board over four days on May 27, May 28, June 2, and June 3, 2021. The Employer asserted that certain employees in the petitioned-for unit are managerial employees, specifically the Admissions Counselor; Student Success Coach; Academic Advisor, Lead Academic Advisor; Assistant Registrar; and Assistant Dean of Student Affairs. The Employer further asserted that the classification of Accounting Assistant is a confidential employee within the meaning of the Act, and that the foregoing classifications should be excluded from the petitioned-for unit on those bases. The Petitioner is of the view that these employees are properly included in the petitioned-for unit, and that a residual unit is presumptively appropriate. The parties timely filed post-hearing briefs. The status of these employees was the only issue raised at the hearing.²

¹ I grant the parties joint motion to amend the petitioner and other formal documents to the extent that they do not correctly reflect the names of the parties as set forth herein.

² Although the Employer initially challenged the appropriateness of the petitioned-for unit as lacking a community of interest, the parties were able to reach agreement on the inclusion and/or exclusion of a majority of the employees in the petitioned-for unit into two voting groups of professional and non-professional employees. The parties further agreed that the group of professional employees would vote by way of a *Sonotone* self-determination election.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. After careful review of the record and the briefs of the party, I find, for the reasons set forth below, that the approximately nine employees in the disputed categories described above are not managerial or confidential employees and are properly included in the petitioned-for unit. Accordingly, I am directing a mail-ballot election be held as agreed to by the parties.

THE EMPLOYER'S OPERATION:

The Employer is a private non-profit college in Seattle, Washington, that offers baccalaureate degrees in performing and visual arts to approximately 500 students, about 200 of whom live on campus. There are also around 100 staff members. The Employer has eight degree-granting departments in theater and performance production, music and dance, visual arts, film, design, and interior architecture. Courses are presented on the semester system with two 15-week sessions annually. There is no official summer semester, although there are activities for students, including tutorials.

The Employer's facilities include a performance facility in Seattle Center referred to as the Playhouse, as well as other adjacent ancillary facilities including a scene shop and a smaller performance theatre located nearby. The Main Campus located in South Lake Union consists of a complex of several buildings, including the Main Campus Center (MCC) that contains classrooms, offices, and the residence hall and commons. There is also a common café at the MCC used by both students and employees, as well as a staff lounge on the seventh floor open to all staff and faculty in the building and conference/meeting rooms on the third floor. A third performance center in the Capital Hill neighborhood – Kerry Hall –houses the music and dance department. Key card access is required at each of the three locations. There are a number of parking lots available at each facility and parking permits can be purchased by faculty and students each semester.

The President of the College, hired by the Board of Trustees, is assisted by several Vice Presidents and Deans to cover the various operational areas of the College. The Academic Affairs division is the largest and is overseen by the Vice President of Academic Affairs and Provost, who in turn oversees the academic departments and their respective chairs and faculty. The faculty are under contract for two semesters per year unless specifically retained for the summer. The Academic Affairs staff, however, works year-round with the exception of only three staff members who work only the academic year.

Within the Academic Affairs division, the Enrollment Division is headed by a vice president responsible for recruiting new students to the College and overseeing the admissions and financial aid departments and their staffs. The Department of Institutional Advancement handles communications, marketing, and fundraising, as well as the Alumni Department, grant writers, and a department that oversees the Neddy Award given to a local artist each year. The Finance Division overseen by the Vice President of Finance (CFO) includes the controller and various accountants, as well as the IT Department and Human Resources. The Director of Industrial Research collects and analyzes admission and retention rates and other data. The Dean of Student Affairs is

responsible for all the student programs, including the Success Coaches, Counselors, residential housing and residential life. Most of the employees in these divisions work year-round at the MCC spread throughout the seven-story building consisting of classrooms, offices and other common areas as described above. Student Affairs, including the Student Success Coach, work from the first-floor commons in the Residence Hall in the MCC.³ The Dean of Student Affairs, who oversees this department, testified that there were administrative components to the positions under her purview where independent judgment could be exercised, particularly with respect to the application of college policy. The President, Vice Presidents, and administrators are housed on the top floor, referred to colloquially as the “Seventh Floor,” which requires special card key access after-hours.

The second-largest division is the Operations Division including the personnel who manage the creative spaces and labs on campus where students develop skills and work on projects. This division includes the Playhouse Managers, facilities, buildings, and grounds maintenance, dining, and security. Many of these employees work out of the Playhouse or Kerry Hall and work year-round, with the exception of the lab resource technicians who work only during the academic year. Likewise, the maintenance employees work year-round.

Most of the faculty works in the MCC, with each academic department or discipline on its own floor or in a specific area on a given floor. Each academic department is fairly self-contained and is separately managed. As noted above, members of the faculty work on an academic-year schedule.

The faculty is responsible for the development of a “model program” – a written description of the curriculum that any student must follow to complete the degree requirements and receive a degree in a particular discipline. The various academic services offices, registrars, uphold and enforce the model program requirements by ensuring that students enroll for the required courses or appropriate substitutes within the desired completion goal of four years. While Admissions Counselors explain the model programs to prospective students, they are not *per se* responsible for enforcing it. They can, however, suggest substitute courses or electives that might satisfy graduation requirements and assist students in formulating personalized education plans that meet their abilities and interests.

Certain employees of the Employer are currently represented by locals of one of three labor organizations: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the U.S Local 15 (IATSE) represents theater and technical professionals in the Operations Division working at the Employer’s Playhouse in Seattle Center who provide services for the productions of both the Employer and third-party clients using the facility. The Seattle Musicians Association, Local 76-493 represents the employees in the Academic Affairs Division who support the Employer’s dance program by providing live music in performance and practicum situations. The Cornish Federation of Teachers represents the largest group of the

³ Since the onset of the COVID-19 pandemic in the spring of 2020, most of the Employer’s employees have worked remotely or from their homes, and the Employer is currently considering whether to allow some of them to continue to do so.

Employer's employees, consisting of core and adjunct faculty who teach at the school in the Academic Department.

All staff employees are subject to the same Staff Handbook (Handbook) promulgated in 2013 and currently in the process of being revised. The Handbook does not currently apply to faculty, which has its own handbook containing some but not all of the same provisions. Some academic departments, such as the dance department, put out their own discipline-specific handbooks. Also, the Handbook does not apply to the employees in the existing bargaining units, unless so stated in their respective collective-bargaining agreements (CBAs). An internet service coordinates the different policies for different departments.

THE DISPUTED CLASSIFICATIONS

Admission Counselor

The Employer asserts that the employees in this position are managerial and should therefore be excluded from the petitioned-for unit on that basis.

The Admission Counselors report directly to the Director of Admissions, who testified that students may apply for admission to the College by written application or through a Common App website. In addition to the application itself, applicants must also submit an essay, letters of recommendation, and academic transcripts. Each applicant's file is first reviewed by an Admission Counselor, and then by a representative of the department the applicant is applying to, and finally by the Director of Admissions: sometimes files are reviewed in group sessions with all three present for greater efficiency. Each reviewer completes a form evaluating the rigorousness of the applicant's educational background and transcript, assigns a grade to the essay, and assesses the offering in the portfolio.⁴ Evaluations of the essay and portfolio are largely subjective, as opposed to the transcript and courses taken which are objective factors. A numerical scoring system of 1 through 9 – with 9 being the highest – is assigned to each factor by the reviewer and is used to determine who is ultimately admitted. The Director of Admissions can question or disagree with a recommendation made by the Admission Counselor and the department representative and may review their analyses with them or call for additional group discussion.

Admission Counselors are organized by discipline based on their expertise in a given artistic field, which allows them to assess the qualifications of the applicants to specific departments in either visual arts (such as painting or drawing) or performing arts (for example, acting, music, musical theatre, or dance). Applicants for the visual arts programs submit a portfolio of their works for review. The performing arts, however, have very specific admissions requirements and require auditions by the applicants which are attended and evaluated by an Admission Counselor with experience in that field and often a department representative.⁵ These applicants are given

⁴ A portfolio generally consists of between 12-20 best examples of visual artistic works of the applicant which are assessed using a different form and scale of "outstanding, meets expectations, or needs work."

⁵ The recent pandemic situation precluded live auditions, and they were submitted by recording instead for review by the Admission Counselor. Also, pre-pandemic, the Admission Counselors could travel to other cities to view auditions.

assignments by the evaluation team, for example, a monologue or particular song, in addition to a performance of the applicant's choosing. There is no checklist for evaluating an audition, and performances are ranked on the 1 to 9 scale described above and then considered in conjunction with the applicant's other qualifications. The Director of Admission does not attend the auditions but relies on the judgment and notes of the Admission Counselor; however, she may institute further discussion or even request an additional audition where an applicant is not in the highest category to assess the prospects of that student's success if admitted. Higher-ranking applicants do not require further debate. Although the Director of Admissions describes this process as a "group effort," she has the final say on which applicants are admitted.

As noted below, the Admission Counselors meet with applicants before and during the application process to help develop their applications and diversify their portfolios prior to submission. Strong portfolios generally contribute to a recommendation for admission, while weaker submissions may require more discussion; although the Director of Admissions has the final say regarding admission, she still seeks input from the entire review team. Portfolios can also be reviewed in advance by a faculty member or department head in the given discipline prior to submission.

The job description maintained by the Employer for this position describes the purpose of the Admission Counselor as recruiting a diverse population of art students and establishing outreach programs to promote the school. The listed responsibilities include overseeing applications, admissions, and enrolled students and engaging in recruitment activities with the Director of Admissions at designated high schools. The Admission Counselors also provide one-on-one admissions counseling for first-year and transfer applicants regarding the admissions process, as well as leading tours of the campus and evaluating portfolios for visual arts students, and finally review and evaluate applications for the purpose of making admissions decisions. Recommendations can be for admission, deny/encourage, or deny. These forms are maintained electronically and are not generally accessible to those outside the admissions office.

Listed minimum qualifications for this position list a Bachelor's Degree and a number of personality traits, while the preferred qualifications include one or more years of related experience, a degree in an artistic discipline, and experience working in a not-for-profit, higher education, or arts environment. No particular training is required for this position, although the Director of Admission works with new Admission Counselors to familiarize them with the process, and also sends a more senior counselor with them on recruitment trips. Inasmuch as new Counselors are generally hired in the summer and the initial application deadline is in December, they have several months to familiarize themselves with the workings of the College and the admissions process: it generally takes a full-year cycle to fully understand the job.

Student Success Coach

The Employer asserts that employees in this classification are managerial employees and should therefore be excluded from the petitioned-for unit on that basis.

The Student Success Coach, located in the Commons building on the Main Campus, works in the Office of Student Life and reports directly to the Dean of Student Affairs. Their duties consist of helping students in four departments – visual arts, design, film, and interior architecture – with various accommodations, be they academic, meal plan, housing, student conduct cases, time management skills, and the like to empower students to advocate for themselves.⁶ Students are generally made aware of these services during orientation at the beginning of the school year, and they are described in the Employer's Student Handbook.

This office is primarily guided by the Rehabilitation Act and the Americans with Disabilities Act (ADA) as well as state and municipal regulations in consultation with the Dean. Some types of accommodations are listed for guidance and others are situational: whatever accommodation is provided can be modified or changed during the course of the year as the student's needs change. The accommodations are apparently not self-effectuating, since students must make a formal request for accommodation and, once granted, must present a letter to and generally have a dialogue with the professor or instructor from whom they desire the accommodation.⁷ The Student Success Coach can also interact with other employees in financial aid, housing, or enrollment in order to assess a student's needs. Most decisions are made by the Student Success Coach based on a dialogue with the student and a review of past accommodations: they may also meet with faculty in the department involved. A more complex or unusual request, or one not supported by proper documentation, is presented for review by the Dean and the other coach: they may ultimately decide to deny the request but this does not occur often. The Dean can also question or ask for justification for an accommodation given by the Student Success Coach and can determine whether the accommodation is reasonable or poses an undue burden on the College and suggest an alternative. There is no established list of *per se* accommodations; rather, accommodations are determined based on the request of the student and a review of supporting documentation. While accommodation requests can technically be denied, the Employer is obligated by law to provide reasonable accommodation, either by granting the student's request or offering a reasonable alternative that comports with the required academic parameters.

The current job description maintained by the Employer for the Student Success Coach lists minimum qualifications as a Bachelor's degree or equivalent experience, and two years' experience in a college or secondary education setting. Preferred qualifications include a Master's Degree in student affairs administration, counseling, or a related field, along with experience in the arts or arts education. The Student Success Coach also receives additional training in regional laws and other laws regarding, for example, emotional support animals. No other specialized training is required for this position, according to the Employer, aside from "typical student affairs training."

⁶ Normally, there would be another Student Success Coach for the performing arts disciplines but that position is currently vacant.

⁷ Some examples given of conditions for which accommodation might be sought included ADHD, irritable bowel syndrome, dyslexia, cognitive or speech impairment. Testing accommodations might include additional time or the assistance of a scribe.

The Dean of Student Affairs testified that this position, as well as others under her purview, contains administrative components as well as instances where independent judgment could be exercised, particularly to applying school policy.

Academic Advisor

The Employer asserts that employees in this classification are managerial employees and should therefore be excluded from the petitioned-for unit on that basis.

The Academic Advisor reports to the Dean of Academic Services and Registrar, who manages all registration and degree progress tracking for the College. Their responsibilities include advising students of which courses are required for their respective model program, and to explain program, degree, and academic policies of the Employer.⁸ The Academic Advisors also work with the students to develop an individualized course of study that both meets the model program for that discipline and acknowledges the abilities and interests of the student with the goal of enhancing student retention.

The job description maintained by the Employer for this position described the duties as advising current and prospective students regarding full-time undergraduate educational programs, resources, requirements, academic status, matriculation, opportunities, options, and administrative processes at the College, as well as assisting students in making strategic decisions concerning educational goals leading to graduation. This might include, according to the job description, connecting students with resources like the Student Success Coach, or having them participate in workshops on academic and student skills.

As noted above, although the Academic Advisors do not create, monitor, or enforce the prescriptive model programs created by the faculty, they do counsel students on alternative courses if a student has missed or failed a required course: their decisions are based on the course syllabus developed by the faculty and the needs of the individual student. The Academic Advisors do not have total discretion in this regard, however, since school policy prohibits substitutions for some required courses: any substitution for those courses must be approved by the Dean. The Academic Advisor can also work with the student to develop strategies for academic success by keeping them within the 15-credit/semester limit.

Independent study programs are not part of the model program and must be developed by the student and a faculty member with the approval of the Academic Advisor.⁹

⁸ Students experiencing academic challenges or other issues that would impede their success are referred to the Student Success Coach.

⁹ An Admissions Counselor might suggest an independent study program in the case where a required course is not offered.

Lead Academic Advisor

The Employer asserts that employees in this classification are managerial employees and should therefore be excluded from the petitioned-for unit on that basis.

The Lead Academic Advisor works with the Dean of Academic Affairs to oversee advising programs for new and continuing students. According to the job description for this position maintained by the Employer, this position serves as the lead academic advisor, educational planner, and advocate for prospective, new, and current student by providing comprehensive advising and support concerning academic plans and progress, academic schedule, choice of major, activities, resources, and career objectives.

The Lead Academic Advisor develops processes within the academic advisor team and can assist the team if the Dean is unavailable. This lead does not supervise the Academic Advisors, but rather provides guidance and interprets existing policy where it is ambiguous or incomplete. Although the Lead Academic Advisors do not develop policy, they work with the advisor team to develop processes and forms to implement policies. Such processes might include, for example, outreach programs, forms, and effective ways of communication with students on academic issues, particularly during the current COVID-19 situation.

In addition, this position performs many of the same functions as the Academic Advisors insofar as advising students about academic programs and requirements and guiding students through the process of identifying their strengths and interests and formulating individualized educational plans. This position also interprets and applies academic policies for student degree requirements and academic progress.

The minimum requirements for this position include a Bachelor's degree or equivalent years of experience and three or more years' experience advising or counseling college-level students on academic issues. Preferred qualifications are a Master's degree in counseling, education, or higher education administration, and five or more years of related experience.

Assistant Registrar

The Employer asserts that employees in this classification are managerial employees and should therefore be excluded from the petitioned-for unit on that basis.

There are currently two distinct Assistant Registrar positions that report to the Dean of Academic Services and Registrar: one handles transfer credit evaluations, but the record does not reveal what the other does. As much as 20% of the Employer's student body is comprised of transfer students.

The job description maintained by the Employer for the Assistant Registrar states that the purpose of this position is to be a policy expert and resource for students and faculty regarding

academic requirements for undergraduate degrees. This person is responsible for academic advising for all students, including new, transfer, and international, and manages all aspects of degree progress for all undergraduates. This individual also administers Study Abroad program and Veteran Education Benefits, develops academic policy in conjunction with the Registrar and the Dean of Academic Services, and assists same with Commencement exercises. The record does not clarify if this job description applies to both Assistant Registrars or only the one who handles transfer credits.

The Assistant Registrar also handles student requests for leave of absence for up to one year by tracking the student and contacting them when their leave expires.

With regard to the Assistant Registrar Transfer Credit Evaluator, as this position is also called, this person reviews transfer credits to ensure they come from an accredited college and a recognized course that matches the parameters of the Employer's offerings and that the student passed the course in question. Some additional research might be required, for example, into the school's credentials in order to determine whether credits are transferable.¹⁰

The minimum qualifications listed in the job description call for a Bachelor's degree plus two-three years relevant experience. Preferred qualifications include experience working in a registration or admissions office, experience with students, including international students, and experience working in a not-for-profit or arts environment.

Assistant Dean of Student Affairs

The Employer asserts that employees in this classification are managerial employees and should therefore be excluded from the petitioned-for unit on that basis.

This relatively new position reports directly to the Dean of Student Affairs, and focuses on equity, diversity, and inclusion issues, as well as overseeing student conduct and alternative dispute resolution procedures.¹¹ The person in this position also assists with first-year and transfer student orientation, and provides support to student governance and student organizations. Work is assigned by the Dean, and the Assistant Dean of Student Affairs keeps a to-do list of tasks they know need to be accomplished, which they acknowledged were largely routine. Before the implementation of pandemic work-from-home, this position was located in the Commons on the Main Campus, with the possibility of an ancillary office in Kerry Hall.

¹⁰ The record is unclear as to who does this research since the Dean of Academic Affairs said both "I" and "we" contact the other school or do the research.

¹¹ The witness who testified in the capacity of Assistant Dean of Student Affairs had only held that position for a month prior to the hearing, and consequently much of their testimony was speculative or based on their prior experiences as Student Success Coach. As such, I do not credit such testimony to the extent that it does not relate to their present duties.

With regard to student conduct issues, the Assistant Dean of Student Affairs acts as the administrative hearing officer after a conduct violation has been found by the Dean.¹² If, after an investigation or hearing, he/she determines that a violation has indeed occurred, proper sanctions are recommended and approved by the Dean.¹³ The Dean does not review the findings of the hearing officer or panel, however, unless there is an appeal. Appeals of sanctions are also handled by the Dean and must be based on procedural or substantive error, such as bias or deviation from established procedures. There are no standard or established sanctions; rather, sanctions are based on the particular circumstances of each case.¹⁴ If sanctions are not met, the Dean can institute a registration hold on the student(s). The Assistant Dean of Student Affairs cannot access a student's file to ascertain whether there have been past violations but must request the Dean to do so, inasmuch as the Dean is classified as a higher-level user who has access to all student information. The Assistant Dean of Student affairs is not involved in the creation of student conduct or academic policy except to provide insight based on interaction with students.¹⁵

An Alternative Dispute Resolution (ADR), rooted in restorative justice philosophy, has recently been added to help resolve student discipline issues. The record does not describe how often this procedure has been utilized by the Assistant Dean of Student Affairs, if ever.

The Assistant Dean of Student Affairs receives complaints, including those for sexual harassment, directly from students or through referrals from faculty. Title IX cases are generally reported to the Title IX coordinator: the Assistant Dean is obliged to report any complaints that come to him/her directly for further investigation by the Title IX coordinator.¹⁶ The Assistant Dean of Student Affairs also served on the President's Task Force on Institutional Equity formed in 2019 in response to student protests over the handling of sexual harassment misconduct complaints, and in this capacity assisted in the revision of the Employer's existing sexual harassment policy which was then forwarded to the college President's cabinet for approval.

¹² This function used to be done by the two Student Success Coaches for visual arts and performing arts, who would hear cases regarding students in the other's jurisdiction to avoid the appearance of favoritism. The hearings have now been assigned to the Assistant Dean of Student Affairs, who has yet to conduct one in that capacity. Hearings may be one-on-one between the hearing officer and the student, or a panel including the Student Success Coach or faculty and staff members. If there is a panel, findings are made by deliberation rather than solely by the Hearing Officer. The Hearing Officer has the authority to limit the number of witnesses presented who do not have firsthand knowledge of the incident or whose names have not been submitted in advance of the hearing.

¹³ The witness who testified in this capacity stated that they had used their own discretion in determining and issuing sanctions for straight-forward uncontested violations, but this appeared to have been done in their previous capacity as Student Success Coach and is therefore deemed not relevant. The Dean of Student Affairs confirmed that the Assistant position was new and that many policies were aspirational at this point and had not been implemented.

¹⁴ Apparently, many sanctions are educational in nature rather than punitive, and often consist of coachings, interviews, or papers. Other sanctions might include warnings, restitution, loss of privileges, probation, suspension, and even expulsion.

¹⁵ Violations are described in the Student Code of Conduct contained in the Student Handbook: some are expressed as educational "values," such as social justice, citizenship, academic integrity, and trust, while others are more technical, like unauthorized entry, drug use or bullying.

¹⁶ I take note that Title IX is a federal civil rights law passed as part of the Education Amendments of 1972 that, inter alia, prohibits sex-based discrimination in any school or other education program that receives federal money. The person presently holding the position of Assistant Dean of Student Affairs has received training from and received two certificates from the Association of Title IX Administrators (ATIXA), including certification as a civil rights investigator.

In a similar capacity, the Assistant Dean of Student Affairs responds to academic concerns raised by faculty members and does outreach with the student to ascertain and resolve the underlying issues. Some solutions are clearly apparent, like a referral to financial aid, and others are more complex and require more input from others.

The Assistant Dean of Student Affairs also oversees the operation of Nelly's Closet – a food and toiletries pantry for students – located in the Commons on the Main Campus and in Kerry Hall. In this capacity, they are given a set budget to purchase food and determine when to buy food and what to buy. Other than this instance, the Assistant Dean for Student Affairs does not make departmental budget decisions or purchase supplies for the department.

The job description maintained by the Employer for the Assistant Dean of Student Affairs requires a minimum of a Master's degree in student affairs administration and/or student affairs, and at least three years of appropriate experience. Preferred qualifications include experience in the arts or arts education.

Accounting Assistant

The Employer contends that the employees in the position of Accounting Assistant are confidential employees and therefore should be excluded from the petitioned-for unit on that basis.

The Accounting Assistant, among other employees who are not at issue here, is overseen by the Controller of the College, who oversees all of the accounting functions, cash flow, general ledger accounts, and student accounts through the Finance Department. The Controller testified at the hearing that the Accounting Assistant and the administrative assistant are responsible for processing all invoices that are paid weekly by the Employer. All invoices are given a code by the person who made the purchase or the budget manager, and each code is department-specific. All invoices, including the legal invoices that are submitted monthly, are reviewed by the Controller and can be paid by purchasing card or by check. All the employees in this department are cross-trained to fill in for and assist one another.

Inasmuch as the Human Resources (HR) department is most likely to utilize outside counsel services, all legal bills are initially reviewed by HR before being sent to the Finance Department for payment, specifically to the Accounting Assistant. Such legal bills would include a detailed summary of services – phone calls, e-mail, and reviews – as well as the contents of those services and the amount of time spent. Consequently, the bills often contained information about labor relations matter, particularly with regard to pending grievances and potential legal actions, most recently about the restructuring of employee benefits and other labor relations strategy.¹⁷ Since April 2019, the Employer has utilized in-house counsel rather than outside counsel and therefore the HR Director has not reviewed any bill from outside legal counsel since that time.

¹⁷ The HR Director testified, without giving a specific example, that if the bargaining unit were made aware of some of the information contained in the legal invoices that it would make effective bargaining difficult for the Employer.

The job description for the Accounting Assistant maintained by the Employer states that this person is the primary contact for purchasing card activities, and supervises the accounts payable process by reviewing accounts/payable data entry, following up with vendors, resolving statement disputes, and managing 1099 issues. Minimum qualification for this position include related coursework beyond high school plus two to three years' experience and word processing skills. Preferred qualifications are a four-year college degree and experience working in a not-for-profit, higher education, or arts environment.

BOARD LAW REGARDING MANAGERIAL EMPLOYEES AND ITS APPLICATION TO THE INSTANT CASE

As noted above, the Employer contends that its employees employed as Student Success Coach, Assistant Dean of Student Affairs, Admission Counselor, Academic Advisor, Lead Academic Advisor, and Assistant Registrar are managerial employees and thus should be excluded from the petitioned-for unit.

Although there is no specific provision in the Act regarding managerial employees, the Board has long excluded them from coverage. The Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980), described faculty managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer,” and who “exercise discretion within, or even independently of, established employer policy.” This test is applied in the conjunctive, and all elements must be met before an employee is deemed to be a manager. *Id.*

Likewise, “managerial” employees have been defined by the Board as employees who formulate and effectuate high-level policies of the Employer, or who “have discretion in the performance of their jobs independent of their employer’s established policy.” *Republican Co.*, 361 NLRB No. 15, slip op. at 3 (2014), quoting *General Dynamics Corp.*, 213 NLRB 851 (1974). The decisions made by managerial employees must be made on behalf of the employer. *Allstate Insurance Co.*, 332 NLRB 759, 762 (2000). However, supervisory status as defined in Section 2(11) of the Act is not equatable with managerial status. *Howard-Cooper Corp.*, 121 NLRB 950, 951 (1958). The party asserting managerial status bears the burden of proof. *Republican Co.*, *supra*, slip op at 4.

An analysis of managerial status must examine, on a case-by-case basis, the degree of discretion and authority exercised by the disputed employees, which generally do not include the exercise of some judgment “within established limits set by higher management.” *Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971). In fact, the Board has long recognized that even the authority to exercise considerable discretion does not render an employee “managerial” where that employee’s discretion must conform to an employer’s established policy.” *Albert Lea Cooperative Creamery Assoc.*, 119 NLRB 817, 822-12 (1957). Thus, an employee may be excluded as managerial if the employee “take[s] or recommend[s] discretionary actions that effectively control or implement employer policy.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1990).

While it does not appear that the Board has specifically addressed the classifications of disputed college employees at issue in the instant case, the Board has frequently examined the managerial status of university and college faculty, finding them to be managers by virtue of their control of curriculum decisions, degrees and degree requirements, tenure standards and selection, and faculty evaluation. *LeMoyne-Owen College*, 345 NLRB 1123 (2005). In the instant case, no party asserts that the employees in the disputed categories are faculty members or that they perform as such. However, the Court's and Board's cases regarding faculty members, while not directly on point, are nevertheless instructive of the Board's reasoning on this issue. The focus in *Yeshiva, supra*, was the effective control that faculty have over academic – as opposed to non-academic – matters, particularly with regard to their authority to make academic policy. *Yeshiva* emphasized the faculty's extensive authority of academic matters such as the school's curriculum academic calendar, course schedules, matriculation standards, teaching methods, and grading policies. Subsequent cases examined the “breadth and depth” of faculty authority, considering decisions that affected the university as a whole, and the ability to “exercise control over areas of policy” within the administrative structure of that university. *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 16 (2014).

The Board has also relied upon traditional principles outside of academia, specifically those developed in the industrial sector, to determine the managerial status of both faculty and non-professional employees. See *Livingston College*, 290 NLRB 304, 305 (1988). Specifically, the Board has examined university and college employees who make recommendations concerning academic governance, including student admission, graduation requirements, grading guidelines, and programs and courses to be offered, and found them to be managerial as long as their recommendations are followed as a rule or even “generally” followed. See *NLRB v. Lewis Univ.*, 765 F.2d 616, 623 (7th Cir. 1985).¹⁸

Applying the foregoing to the duties and job descriptions of the disputed classifications, and for the reasons set forth below, I find that the Employer has not met its burden to show that these disputed classifications are managerial employees and therefore I conclude that they should be included in the petitioned-for unit of professional employees.

Admission Counselor

The Employer asserts that Admission Counselors play a significant and meaningful role in scoring and ranking of prospective applicants to the college and should therefore be excluded from the petitioned-for unit as managerial employees. In this regard, the Employer argues that the Admission Counselors use subjective factors to score many facets of a student's application, particularly with regard to the mandatory essay. The Director of Admissions confirmed that once the counselors completed at least their first admissions cycle, she relied on their recommendations. This responsibility, along with the ability to suggest portfolio submissions, affords the Admission Counselors a significant degree of discretion, according to the Employer.

¹⁸ The Board in *Lewis* also dealt primarily with faculty members who formulated university governance proposals in committee that were then either accepted or rejected by the administration.

The Employer further argues that the ratings assigned to student applications by the Admission Counselor also affect the student's scholarship eligibility and other aid. Finally, the Employer asserts that the decisions made by these employees "directly impact the makeup of the student body," which further demonstrates the meaningful role played by the Admission Counselors.

While it appears undisputed that these employees play a significant and meaningful role within the college, there is insufficient evidence that they meet the criteria for managerial employees. Specifically, while they may effectuate the Employer's admissions policies, they do not formulate or determine such policies. As noted above, the Employer's witness conceded that while the Admission Counselors explain the model programs developed by the faculty to prospective students, they are not *per se* responsible for enforcing the programs.¹⁹

Moreover, the fact that the Admission Counselors may play a meaningful role in the administration of the college is not sufficient, in and of itself, to make them managerial employees. In this regard, the Employer's reliance on *Univ. of Dubuque*, 289 NLRB 349 (1988) is misplaced. The Board in *Dubuque* first found that the faculty formulated academic policy with regard to grading, student conduct, degree requirements, and curricular content and courses. The Board then examined the faculty's role in effectively recommending discretionary actions with regard to faculty promotion, hire, tenure, dismissal for cause, and leave. While noting that these latter duties were of lesser significance than the formulation of academic policy, the Board concluded, based on the totality of the evidence, that the faculty played a significant role in the operation of the university. *Supra* at 352. In the instant case, there is no evidence that the Admission Counselors formulate the criteria for admission: rather it appears that they largely follow established employer policies regarding academic and artistic criteria which are set by the faculty and the administration of the college. Moreover, even though they may exercise some level of discretion in evaluating and grading students' application and portfolios, they are constrained by the elements and scoring systems already in place. Thus, their exercise of these secondary criteria, without the ability to exercise control over college policies, is not sufficient to show managerial status. See *Pacific Lutheran University*, *supra*, slip op. at 16.

For these reasons, I find that the Admission Counselors are not managerial employees, and that they may be properly included in the petitioned-for unit.

Student Success Coach

The Employer asserts that the Student Success Coach is a managerial position and that it should be excluded from the petitioned-for unit on that basis.

The record shows that these employees provide requested accommodation under the ADA and other statutes based on student needs and a review of past accommodations. The Dean of

¹⁹ I note that the Employer did not present any employee currently in the position of Admission Counselor, and that the Director of Admission testified as to their duties as described in the Employer's most recent job description. While this affects the weight of the testimony, I do not draw an adverse inference as requested by the Petitioner.

Student Affairs must approve any complex or unusual request for accommodation, although The Student Success Coach's recommendation is generally taken. In this regard, the Employer is obligated under federal and state law to provide reasonable accommodations if warranted.

Although there is not a per se list of available accommodations, which are determined based on the needs of the individual student, the Student Success Coach is still constrained by the Model Program created by the faculty with regard to attendance and curriculum-based accommodations.

In addition to assisting students with accommodations, the Student Success Coach also helps students with time management and other academic challenges, and coaches students to advocate on their own behalf. There is no evidence that the Student Success Coach exerts any control over academic or administrative practices. Moreover, although the Student Success Coach may use professional judgement in arranging for student accommodations, this judgment appears to fall within the parameters of existing school policy.

Thus, the record shows that not only do the Student Success Coaches not promulgate or enforce policy, but they exercise only limited discretion within the parameters of the policies set by the Employer. Therefore, I conclude that the Employer has not met its burden to show that these employees are managers, and find that they should be included in the petitioned-for unit.

Academic Advisor and Lead Academic Advisor

The Employer asserts that these employees all have job duties that satisfy the managerial employee exception.²⁰

The Employer conceded that the Model Program Policy as developed by the faculty provides for the curriculum that a student must follow to complete degree requirements and earn a degree. The Employer's witnesses testified that this policy was not a "rigid" one, and that the Academic Advisors have the discretion to allow for substitute courses based on their knowledge and ability to determine which courses would fit the faculty's established criteria. Academic Advisors also have the discretion to "guide" students and to formulate personalized learning programs to aid struggling students. Moreover, the job description for the Lead Academic Advisor specifically allows for this employee to "interpret and apply academic policies for student degree requirements" and "develop strategies for academic success."

While these collective Advisors have some discretion to adjust a student's course of study and to substitute one required course for another, they do so within the prescriptive models established by the faculty and their suggested substitutions are based on the course syllabi developed by the faculty. Moreover, their discretion is limited, since established school policy prohibits substitutions for certain courses that are required by the faculty. Basically, the bulk of the Academic Advisors' job is to advise students which courses are required for their respective model program as established by the faculty and to explain the program, degree, and academic policies

²⁰ I note again that the Employer did not present any employees currently in this position to testify at the hearing but called the Director of Admissions and the Dean of Academic Services who largely relied upon the Employer's job description.

established by the Employer's faculty. This is not sufficient to show that these employees formulate, determine, and effectuate the Employer's policies or that they have the discretion, independent of those policies, to apply those policies.

The duties of the Lead Academic Advisor are likewise largely limited to providing guidance to students within the program parameters established by the faculty, and to interpret existing policy where it is ambiguous or incomplete. The fact that this role might be more "complex" than that performed by the Academic Advisors is not by itself evidence that they are managers. In this regard, the record states that they do not create or enforce the prescriptive model programs created by the faculty, but primarily work with the advisory team to develop processes and forms to implement existing policies. There is no evidence that they formulate or determine that policy, or that they have the discretion, independent of those policies, to apply them. Therefore, the Employer has not met its burden of showing that the Lead Academic Advisors are managerial employees.

Based thereon, I find that the Academic Advisor and the Lead Academic Advisor are not managerial employees and that they may be included in the petitioned-for unit.

Assistant Registrar

The Employer asserts that the position of Assistant Registrar is a managerial one and should therefore be excluded from the unit on that basis. Specifically, the Employer argues that these employees "play a significant role" in assessing student's course loads and degree requirements, including transfer credits from other institutions.²¹

As noted above, the job description for this position describes the Assistant Registrar as the "policy expert ... regarding academic requirements," and that their assessment of a student's degree process is determined by the Model Program developed by the faculty.²²

While the Assistant Registrar may use some discretion in reviewing applicant's transcripts and analyzing whether credits can be transferred, there is insufficient evidence in the record to show that they exercise this discretion independent of the Employer's policies established by the faculty and administration. The fact that these actions have a significant impact on transfer students does not, in and of itself, meet the burden of showing that these employees are managerial.

²¹ As was the case with other classifications that the Employer was contesting, the Employer did not call any employee in this classification to testify at the hearing and relied solely upon the testimony of the Dean of Academic Services and the Employer's job description for this position. Also, the Dean testified only with regard to the duties of one of the two Assistant Registrars, and therefore the record does not reveal what the other one does.

²² The job description provided also states that the Assistant Registrar "develops academic policy in conjunction with the Registrar and Dean of Academic Services." However, inasmuch no example of such authority was adduced, and no Assistant Registrar testified at the hearing, there is insufficient evidence to show that these employees exercise discretion outside the parameters of the Employer's established policies.

Based upon the foregoing, I conclude that the Employer has not met its burden of showing that the Assistant Registrars are managers, and thus I find that they may be properly included in the petitioned-for unit.

Assistant Dean of Student Affairs

The Employer asserts that the Assistant Dean of Student Affairs should be excluded from the petitioned-for unit because she is a managerial employee. In this regard, the Employer relies on the fact that the Assistant Dean serves as primary administrative hearing officer for student conduct cases – reviewing evidence, questioning witnesses, and making determinations as to whether there has been a violation of the Employer’s policies. This employee has also been involved in the development of the Employer’s sexual misconduct policy designed to help implement Title IX mandates, but not in the capacity of Assistant Dean of Student Affairs but only as a staff council representative.

Once again, the Employer mistakenly relies primarily on the Assistant Dean’s authority to make factual determinations and use independent judgement and discretion as the bases for finding managerial authority. It is clear that this employee does not make student conduct policies but only applies them to situations where violations are suspected: the employee currently holding this position testified that she “assists in the operational duties of the student conduct process,” confirming that she does not make the underlying policy. In fact, most basic infractions are set out in the Employer’s code of student conduct, which is developed by the college administration. With respect to Title IX practices, the Employer is required by law to implement this statute, and the Assistant Dean enforces procedures to ensure that it is adhered to.

Even if the Assistant Dean’s participation in these investigations and hearings and the ability to recommend discipline were sufficient to show managerial status, the record shows that this is a relatively new position at the college, and the person currently holding this position had yet to conduct any investigations or hearings. The Dean of Student Affairs admitted that many of the described policies and duties of this position were still largely aspirational and had not yet been implemented.

Thus, I find that there is insufficient evidence on the record to demonstrate the extent of the Assistant Dean’s participation in making policy regarding Title IX, or her use of discretion beyond college policy to implement same. Moreover, the Assistant Dean does not develop student conduct policy, and merely uses professional judgment and limited discretion in determining discipline for violations of the established student conduct code. As such, I conclude that the Employer has not met its burden to show that this employee is a managerial employee and find that the position of Assistant Dean of Student Affairs be included in the petitioned-for unit.

BOARD LAW REGARDING CONFIDENTIAL EMPLOYEES AND ITS APPLICATION TO THE INSTANT CASE

The Employer asserts that the Accounting Assistant is a confidential employee and should be excluded from the petitioned-for unit on that basis.

“Confidential employees” are defined as employees who (1) share a confidential relationship with managers who “formulate, determine, and effectuate management policies in the field of labor relations, and (2) assist and act in a confidential capacity to such persons.” *Waste Management de Puerto Rico*, 339 NLRB 262, 262 fn. 2 (2003). The terms “formulate, determine, and effectuate” are assessed in the conjunctive. *Weyerhaeuser Corp.*, 173 NLRB 1170, 1172 (1968).

This test, known as the “labor nexus” test, was endorsed by the Supreme Court in *NLRB v. Hendricks Cnty. Rural Electric Corp.*, 454 U.S. 170 (1981). The Board has adhered strictly to this definition and has long held that employees who meet this test are excluded from the bargaining unit.

As an alternative, the Board has also considered employees who have “regular” access to confidential information concerning anticipated changes that may result from collective-bargaining negotiations to be confidential employees. *Crest Mark Packing Co.*, 283 NLRB 999 (1987).²³ However, it is insufficient to show that an employee has occasional access to labor-related or

personnel information. Under either analysis, the party asserting confidential status has the burden of providing evidence to support its assertion. *Hendricks, supra*, at 188-189.

The Employer argues that the Accounting Assistant is a Confidential Employee based solely on the assertion that this employee reviews and has access to legal bills from outside counsel that include confidential information that could impact labor negotiations. The evidence presented, however, does not support this argument.

First, the Employer did not present an Accounting Assistant to testify, but presented the Controller and the Human Resources Director, who asserted that the Accounting Assistants process legal bills in their “original form,” and that such legal bills from outside law firms contained a “detailed summary” of the legal services provided, including, *inter alia*, the “content of the interactions between the Employer and outside counsel,” which might include information about labor relations issues. However, the Employer did not provide an example of such a bill that contained any such information, much less any negotiation strategies that the Employer asserted such bills might contain.²⁴

²³ In *Crest Mark*, the Board determined an employee to be “confidential” because that employee typed up contract proposals that were to be tendered to the union during collective bargaining negotiations.

²⁴ The Employer did not explicitly assert that such bills were proprietary or otherwise privileged: a redacted bill or one where strategy was discussed and subsequently effectuated could have been produced without compromising confidentiality. Moreover, the Employer’s assertion that these bills were in “plain English” and easy to understand is not supported by any example or corroborative evidence. Thus, absent any specific examples of the kind of detail contained in such bills, the Employer’s testimony in this regard is conclusory and speculative and therefore I do not rely on it in making my decision.

Second, the Employer's witnesses admitted that the Employer had not used outside counsel for more than two years, and that all legal work, particularly that involving labor relations, was being done by in-house counsel. Inasmuch as the Employer's witnesses confirmed that in-house counsel did not submit bills for legal work it performed for the Employer, the Accounting Assistants no longer review any legal bills.

Based on the foregoing, I find that the Employer has not met its burden of showing that the Accounting Assistant has regular access to confidential information concerning anticipated changes that may result from collective-bargaining negotiations to be confidential employees. Based thereon, I therefore conclude that this position may be included in the petitioned-for unit.

Inasmuch as I have found that the disputed employees may properly be included in the petitioned for unit and the parties have reached agreement on the other employees sought, I am ordering a *Sonotone* self-determination in the two units comprised of professional and non-professional employees as agreed to by the parties and described below.

CONCLUSIONS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²⁵
2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The following employees of the Employer constitute appropriate voting groups in the petitioned-for *Sonotone* election:

²⁵ The parties stipulated to the following facts regarding commerce:

Cornish College of the Arts, a State of Washington corporation with a facility and principal office located in Seattle, Washington, is a private arts college. During the past twelve months, the Employer has derived gross revenues in excess of \$1 million and has purchased and received goods and services valued in excess of \$5,000 which originated outside the State of Washington.

VOTING GROUP – UNIT A (PROFESSIONAL UNIT):

Included: Counselor and Clinical Supervisor, Library Specialist, Access Services Librarian, and Performing Arts Librarian employed by the Employer at its Seattle, Washington, Campus.

Excluded: All other employees, non-professional employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act.

VOTING GROUP – UNIT B – (NON-PROFESSIONAL UNIT):

Included: Admission Counselor, Student Success Coach, Academic Advisor, Lead Academic Advisor, Assistant Registrar, Assistant Dean of Student Affairs, Accounting Assistant, Resident Producer, Faculty Staff II, Department Coordinator, IT coordinator II help desk, grant and foundation relations manager, advancement services manager, assistant registrar NE, resource lab technicians, digital content specialists, administrative assistant, technical director and lighting designer, academic affairs department manager, multimedia manager, data systems engineers, ADSM office assistant, student accounts coordinator, program assistant, business systems analyst, visual arts computer support coordinator, lead custodian, senior financial aid specialist, financial aid specialist, alumni relations manager, foundations administrator, admission office coordinator, external rentals manager, and custodial staff.

Excluded: All other employees, controller, payroll and accounting specialist, G/L account, finance administrative assistant, Patron services manager, IT support lead, associate director of enrollment, professional employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act.

Although the record does not indicate the number of employees in each Voting Group collectively, based on the number in the petition there are approximately 52 employees in the petitioned-for voting groups.

The non-professional employees (Voting Group B) will be polled to determine whether they wish to be represented by the Petitioner. The professional employees (Voting Group A) will be asked the following two questions on their ballot:

1. Do you wish to be included with non-professional employees in a single unit for the purposes of collective bargaining? The choices on the ballot will be “Yes” or “No.”
2. Do you wish to be represented for the purposes of collective bargaining by **Office & Professional Employees International Union Local 8**? The choices on the ballot will be “Yes” or “No.”

If a majority of the professional employees (Voting Group A) vote "Yes" to the first question on the ballot, indicating their desire to be included in a unit with non-professional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the non-professional employees (Voting Group B) to determine whether the employees in the overall unit wish to be represented by Petitioner. If, on the other hand, a majority of the professional employees vote against inclusion, they will not be included with the non-professional employees. Their votes on the second question will be separately counted to determine whether they wish to be represented by the Petitioner in a separate unit.

Thus, the unit determination is based, in part, upon the results of the election among the professional employees. However, I made the following findings in regard to the appropriate unit:

If a majority of the professional employees vote for inclusion in a unit with nonprofessional employees, I find the following single unit will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Counselors and Clinical Supervisors, Library Specialist, Access Services Librarian, Performing Arts Librarian, Admission Counselor, Student Success Coach, Academic Advisor, Lead Academic Advisor, Assistant Registrar, Assistant Dean of Student Affairs, Accounting Assistant, Resident Producer, Faculty Staff II, Department Coordinator, IT coordinator II help desk, grant and foundation relations manager, advancement services manager, assistant registrar NE, resource lab technicians, digital content specialists, administrative assistant, technical director and lighting designer, academic affairs department manager, multimedia manager, data systems engineers, ADSM office assistant, student accounts coordinator, program assistant, business systems analyst, visual arts computer support coordinator, lead custodian, senior financial aid specialist, financial aid specialist, alumni relations manager, foundations administrator, admission office coordinator, external rentals manager, and custodial staff, employed by the Employer at its Seattle, Washington, Campus; excluding all other employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act.

If a majority of the professional employees do not vote for inclusion in a unit with nonprofessional employees, I find the following groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT A (PROFESSIONAL UNIT):

All Counselors and Clinical Supervisor, Library Specialist, Access Services Librarian, and Performing Arts Librarian employed by the Employer at its Seattle, Washington, Campus; excluding all other employees, non-professional employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act.

UNIT B (NON-PROFESSIONAL UNIT):

All Admission Counselors, Student Success Coach, Academic Advisor, Lead Academic Advisor, Assistant Registrar, Assistant Dean of Student Affairs, Accounting Assistant, Resident Producer, Faculty Staff II, Department Coordinator, IT coordinator II help desk, grant and foundation relations manager, advancement services manager, assistant registrar NE, resource lab technicians, digital content specialists, administrative assistant, technical director and lighting designer, academic affairs department manager, multimedia manager, data systems engineers, ADSM office assistant, student accounts coordinator, program assistant, business systems analyst, visual arts computer support coordinator, lead custodian, senior financial aid specialist, financial aid specialist, alumni relations manager, foundations administrator, admission office coordinator, external rentals manager, and custodial staff; excluding all other employees, controller, payroll and accounting specialist, G/L account, finance administrative assistant, Patron services manager, IT support lead, associate director of enrollment, professional employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting groups found appropriate above. Employees will vote whether or not they wish to be represented by **OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 8**.

A. Election Details

I have determined that a mail ballot election will be held pursuant to the agreement of the parties. The Petitioner has waived seven of the 10 days it is entitled to have the voter list described below.

The mail ballots will be mailed to employees employed in the appropriate voting groups by a designated official from the National Labor Relations Board, Region 19 office on Thursday, August 19, 2021. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 19 office by 3:00 p.m. on Thursday September 9, 2021. The mail ballots will be counted by a designated Board Agent of the National Labor Relations Board at 1:00 p.m. on Tuesday, September 14, 2021 with participants being present via electronic means. The parties agreed in the stipulated record that, in the event I ordered a mail ballot election, only those ballots that arrive in the Region 19 office prior to the due date, which is by 3:00 p.m. PDT on Thursday, September 9, 2021, will be counted and that no objections will be filed based upon any such untimely received ballots.

Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be void.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 19 office by no later than 4:45 p.m. on Thursday, August 26, 2021, in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. **The Employer must provide a separate election eligibility list for each voting group.**

To be timely filed and served, the list must be *received* by the regional director and the parties by **August 11, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the

equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the voting groups found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the voting groups found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election.

For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it

did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated this 9th day of August, 2021.

Ronald K. Hooks

Ronald K. Hooks, Regional Director
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